FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1144 [illegible] 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

HERBERT A. FRIEDLICH,
LEO F. TIERNEY,
HARRY THOM, and
LOUIS A. KOHN,
Attorneys for Petitioners.

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Opinions below 2

Statement of matter involved 2

Statute involved 4

Jurisdiction 5

Questions presented 5

Reasons relied on for allowance of Writ 6

BRIEF IN SUPPORT OF PETITION 15

Specification of Errors 15

Brief and Argument 16

I. Spiegel had no possibility of reverter by operation of Illinois Law and no other interest in trust property 16

It cannot be determined under Illinois law whether grantor of a remainder has possibility of reverter by operation of law without first determining whether remainder is vested or contingent 16

Under Illinois law, vested remainder cannot fail or revert 18

Spiegel remainders were, and Respondent has conceded they were, vested 19

Authorities as to vesting under wills are applicable to inter vivos trusts 20

Spiegel remainders could not possibly be divested in favor of Spiegel or his estate .. 20

Trust property was not taxable under Estate Tax Regulations 21

II. The instant case is controlled by *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.. 22

There is no substantial difference between *Reinecke* and Spiegel trusts..... 22

Erroneous Statement in this Court's opinion as to *Reinecke trusts*..... 22

Reinecke trusts were held non-taxable and Spiegel trust should likewise be held non-taxable 24

III. Under *Dobson* v. *Commissioner*, 320 U. S. 489, decision of Tax Court must stand..... 24

The Tax Court's decision involved a mixed question of law and fact..... 25

The Tax Court received evidence that Spiegel did not intend the trust to take effect at or after his death..... 26

IV. This Court has not passed upon, and should settle, question whether mere possibility of reverter by operation of law renders trust property taxable under Section 811(c)..... 28

Interpretation of *Hallock* and related decisions by Circuit Courts of Appeals..... 28

Interpretation of *Hallock* and related decisions by Tax Court 29

Conflicting interpretations of this Court's decisions 30

Conclusion 32

Table of Cases.

Baley v. Strahan, 314 Ill. 213 (1924) 16, 18
Beach v. Busey, 156 F. 2d 496 (C. C. A. 6th, 1946), certiorari denied 29
Becker v. St. Louis Union Trust Co., 296 U. S. 48 (1935) 17
Belding v. Parsons, 258 Ill. 422 (1913) 17
Blair v. Commissioner, 300 U. S. 5 (1937) 7
Boye v. Boye, 300 Ill. 508 (1921) 19
Brooklyn National Corporation v. Commissioner, 157 F. 2d 450 (C. C. A. 2d, 1946), certiorari denied, 67 Sup. Ct. 96 25
Campanari, Estate of Nina M., 5 T. C. 488 (1945) .12, 29, 30
Central Hanover Bank & Trust Company v. United States, 58 F. Supp. 565 (Ct. Claims, 1945) 26
Commissioner v. Bank of California (Estate of M. E. Girvin), 155 F. 2d 1 (C. C. A. 9th, 1946), certiorari denied, 67 Sup. Ct. 73 ..... 11, 28, 29, 30, 31
Commissioner v. Bayne's Estate, 155 F. 2d 475 (C. C. A. 2d, 1946) 11, 28, 29, 30, 31
Commissioner v. Field, 324 U. S. 113 (1945) 7, 12, 13, 17, 18, 29, 30, 31, 32
Continental Illinois National Bank and Trust Co. v. Kane, 308 Ill. App. 110 (1941) 20
Dobson v. Commissioner, 320 U. S. 489 (1943) 5, 11, 24-25, 32
Edgington v. Fitzmaurice, 29 Ch. D. 459 25
Fidelity-Philadelphia Co. v. Rothensies, 324 U. S. 108 (1945) 7, 12, 13, 17, 29, 30, 31, 32
Friedman, Estate of Nettie, 8 T.C.—, No. 7, 6 [CCH] T. C. Decisions No. 15,552 (Jan. 17, 1947) 10-11, 12, 25, 27, 29, 30

Gehlbach v. Briegel, 359 Ill. 316 (1935) 17
Harder v. Matthews, 309 Ill. 548 (1923) 20
Hawkins v. Bohling, 168 Ill. 214 (1897) 16, 18
Henderson v. Harness, 176 Ill. 302 (1898) 20
James E. Henderson, Executor v. Rogan, ... F. 2d ..... (C. C. A. 9th, Jan. 17, 1947), 47-1 U.S.T.C. [CCH] ¶10,540 26
Helvering v. Hallock, 309 U. S. 106 (1940) 7, 12, 13, 17, 29, 30, 31, 32
Helvering v. St. Louis Union Trust Co., 296 U. S. 39 (1935) 17
Hickox v. Klaholt, 291 Ill. 544 (1920) 19
Hughes, Estate of Edward P., 7 T.C.—, No. 157, 6 [CCH] T.C. Decisions No. 15,510 (Dec. 16, 1946) 12, 29, 30
Illinois Land and Loan Co. v. Bonner, 75 Ill. 315 (1874) 20
Klein v. United States, 283 U. S. 231 (1931) 16, 17
Lachenmyer v. Gehlbach, 266 Ill. 11 (1914) 6, 19, 20
Matthews v. Andrews, 290 Ill. 103 (1919) 17
McFarland v. McFarland, 177 Ill. 208 (1898) 20
Murphy v. Westhoff, 386 Ill. 136 (1944) 19
Reinecke v. Northern Trust Co., 278 U. S. 339 (1929) 5, 9-10, 22-24, 32
Rhodes, Estate of George P., 6 [CCH] T.C. Decisions No. 15,647 (M) at pp. 26356-7 (Feb. 24, 1947) 30
Smith v. Dugger, 310 Ill. 624 (1924) 20
Smith v. West, 103 Ill. 332 (1882) 16, 18
Stombaugh v. Morey, 388 Ill. 392 (1944) 19
Thomas v. Graham, 158 F. 2d 561 (C.C.A. 5th, 1946) 29
Warrington v. Chester, 294 Ill. 524 (1920) 8, 19
Welch v. Crowe, 278 Ill. 244 (1917) 19
Winterland v. Winterland, 389 Ill. 384 (1945) 19

Statutes.

Illinois Revised Statutes—1945—Chapter 3, Sec. 162, Seventh 19
Internal Revenue Code, § 811 (c) (26 U.S.C.—1940 ed. —Sec. 811) 2, 4-5, 7, 11, 17, 26, 28, 29, 32
Judicial Code, § 240(a), as amended by Act of Feb. 13, 1935 5

Miscellaneous.

Eisenstein, The Hallock Problem: A Case Study in Administration, 58 Harv. L. Rev. 1141, 1169 (1945) .. 31
Estate Tax Regulations 105, Sec. 81.17 ..... 9, 21
Gray, The Rule Against Perpetuities, 4th ed. (1942), § 101 18-19
Kales, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed. (1920), §§ 93, 94, 327 18
Paul, Federal Estate and Gift Taxation, 1946 Supplement, pp. 170-201 ..... 13, 31
Restatement of Law of Trusts, § 411(l.) (1935) 16, 18
Spencer, The Federal Estate Tax on *Inter Vivos* Trusts: A Common Sense Rule for Hallock Cases, 59 Harv. L. Rev., pp. 43, 67, Note 59 (1945) 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, KATHERINE J. SPIEGEL AND ROBERT MICHELS, SURVIVING EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF SIDNEY M. SPIEGEL, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The above-named Petitioners, by Herbert A. Friedlich, Leo F. Tierney, Harry Thom and Louis A. Kohn, Petitioners' attorneys, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on December 28, 1946.

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 126) is not officially reported. The opinion of the Circuit Court of Appeals (R. 151-8) is not yet reported.

STATEMENT OF MATTER INVOLVED.

Decedent, Sidney M. Spiegel, died in 1940 (R. 25). Respondent alleged a deficiency in estate tax, due from Petitioners, of $454,788.58 (R. 8). Substantially all of the alleged deficiency arose out of inclusion by Respondent, in the gross estate of decedent, of $1,140,606.30 which was the value of personal property held under an *inter vivos* trust created by decedent in 1920 (R. 9). Respondent claimed that the trust was a transfer intended to take effect in possession or enjoyment at or after decedent's death within the meaning of Section 811(*c*) of the Internal Revenue Code (R. 29).

The pertinent facts, as established, may be summarized as follows:

In 1920, decedent, a resident of Illinois, transferred certain stocks and bonds to trustees, also residents of Illinois, by a written trust instrument (R. 25). The trust (R. 86-7)[1] provided for the payment of income equally to decedent's three named children during decedent's lifetime. Upon Spiegel's death, corpus of the trust was to be divided equally among the same

1. The salient provisions of the trust appear in footnote 2 to the opinion of the Circuit Court of Appeals (R. 151-2).

three children and, if any of the three children had died leaving children surviving, the surviving children of the deceased child would receive the share to which their parent would have been entitled, and, if any of the three children had died leaving no child surviving, the deceased child's share would go to the other named children and descendants of any other deceased child, *per stirpes*.

The trust made no provision whatsoever for reversion of the trust property to decedent or his estate, or for any other disposition, if Spiegel survived all of his three named children and all of their descendants. Decedent retained no power to alter, amend or modify the trust and no power of appointment.

Only taxability of corpus is here in question (R. 129). No question of contemplation of death is involved (R. 26).

At the creation of the trust in 1920, decedent was 47 years old and a widower, and his three children, named in the trust, were his only children and were 23, 15 and 13 years of age, respectively (R. 25). Decedent died more than 20 years later, aged 68 years, without remarrying, and leaving those three children, who were then 44, 36 and 34 years, respectively, and three grandchildren (children of a surviving daughter of decedent) who were then 10, 4 and 2 years, respectively (R. 25).

During the lifetime of decedent, his three children received the income of the trust estate (R. 25). On decedent's death, the three children received the corpus in equal shares (R. 26).

Petitioners did not include any part of the value of the trust estate in the gross estate of decedent returned for estate taxes (R. 26). Respondent, however, increased the value of the gross estate, as returned, by $1,151,189.21 (of which $1,140,606.30 represented the value of corpus of the trust estate, R. 9, 26) and, for that reason, alleged an estate tax deficiency of $454,788.58 (R. 8).

Petitioners petitioned The Tax Court of the United States for a redetermination of the deficiency and, in addition, claimed a refund of $4400 by reason of additional administration expenses not deducted in the return (R. 3). The Tax Court held that decedent had retained no "string or tie" amounting to a possibility of reverter (R. 129) and determined, accordingly, that no part of the value of the trust estate could be included in the gross estate of decedent for estate tax purposes (R. 129). The Tax Court decided that Petitioners were entitled to a refund of $2,423.95 (R. 133).

Respondent petitioned the Circuit Court of Appeals for the Seventh Circuit to review the decision of the Tax Court (R. 134). The Circuit Court of Appeals reversed the Tax Court, and, in its opinion, found that the entire value of corpus of the trust estate was properly included in the gross estate of decedent, holding that, by operation of Illinois law, "there was a possibility of the trust failing and the property returning to the settlor" (R. 157).

STATUTE INVOLVED.

Section 811(c) of the Internal Revenue Code:

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or

after his death, * * *; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

(26 U. S. C.—1940 ed.—Sec. 811.)

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 28, 1946 (R. 159) and rehearing denied on January 23, 1947 (R. 201). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

I. Whether there was actually any possibility of reverter of the corpus of the trust to decedent by operation of Illinois law.

II. Whether the decision of the Circuit Court of Appeals conflicts with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.

III. Whether, under *Dobson* v. *Commissioner*, 320 U. S. 489, the decision of the Tax Court in favor of Petitioners must stand.

IV. Whether, even if decedent had any possibility of reverter by operation of Illinois law, the creation of the trust was a transfer intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811(c) of the Internal Revenue Code.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Illinois law in a way which is in conflict with applicable Illinois decisions.[2]

The court below decided that the remainders, created by the Spiegel trust, were contingent, and that, consequently, decedent had a possibility of reverter by operation of Illinois law in the event all of his descendants predeceased him. Its decision conflicts irreconcilably with *Lachenmyer* v. *Gehlbach,* 266 Ill. 11 (1914), and the other applicable Illinois Supreme Court decisions which have consistently held that remainders, such as the Spiegel remainders, are vested, with the result that the settlor thereof has no possibility of reverter by operation of law in any event.

A grantor of a *vested* remainder does not, by operation of Illinois law, retain any possibility of reverter. Upon the death of a vested remainderman before termination of the preceding estate, his vested remainder passes under the remainderman's will or as his intestate property to his next of kin or escheats. On the other hand, a grantor of a *contingent* remainder does retain a reversion under Illinois law, and, therefore, has a possibility of reverter by operation of that law. In the event the grantor dies, his reversionary interest in a contingent remainder passes under the grantor's will or to his next of kin as his intestate property.

Under Illinois law, therefore, it cannot be determined whether a grantor of a remainder has a possibility of reverter by operation of law without first determining

3. See supporting Brief, pp. 16-21, for relevant authorities and argument with respect to this first reason for allowance of writ.

whether the remainder is vested or contingent. This involves technicalities of Illinois property law. Nevertheless, those technicalities are the factors, and the *only* factors, which, under Illinois decisions, govern the existence or nonexistence of any possibility of reverter by operation of law, and they must be faced.

This Court (in *Helvering* v. *Hallock*, 309 U. S. 106, *Fidelity-Philadelphia Co.* v. *Rothensies*, 324 U. S. 108, and *Commissioner* v. *Field*, 324 U. S. 113) has, it is true, stated in no uncertain terms that it will not decide tax liability under Section 811(c) of the Internal Revenue Code on the basis of niceties of conveyancing. However, each of those decisions, unlike the instant case, involved a trust which contained an *express* provision (whatever technical name was given to the provision) for a reverter under certain contingencies to, or for a testamentary power of appointment by, the grantor. None of those decisions required consideration of, or considered, a possibility of reverter solely by operation of law.

It is, of course, a truism that a possibility of reverter by operation of law—not by express provision of a trust instrument—*cannot* exist unless the applicable property law (Illinois, in this case) will, in fact, so operate as to cause the property to revert. The decisions of the Illinois Supreme Court are clear that a vested remainder cannot fail and revert, under any circumstances, since, by definition, there must always be someone (whether the remainderman or his legatees or next of kin) ready to take possession of a vested remainder whenever and however the preceding estate terminates. Accordingly, there can be no possibility of reverter by operation of Illinois law with respect to a vested remainder; the settlor or his estate cannot possibly retake. This Court, in *Blair* v. *Commissioner*, 300 U. S. 5, 9-10, held that "the character of the trust, the nature and extent of the interest of the

beneficiary, and the power of the beneficiary to assign that interest in whole or in part" must be determined by the local property law—here, Illinois law.

There is no doubt that, under Illinois law, the Spiegel remainders were vested. At the oral argument before the Circuit Court of Appeals, Respondent's counsel so conceded. The Circuit Court of Appeals, nevertheless, held the remainders to be contingent, reaching that result by disregarding Respondent's concession and all of the Illinois authorities as to vesting. It frankly refused to follow Illinois decisions as to vesting of remainders under wills in the erroneous belief that those decisions are inapplicable to *inter vivos* instruments (R. 153). The Illinois Supreme Court, however, has definitely held that its decisions with respect to vesting under wills are likewise applicable to vesting under *inter vivos* instruments.

Under Illinois law, the remainders vested in interest immediately upon creation of the trust, notwithstanding they were subject to divestment by conditions subsequent or executory limitations in the event that a child (vested remainderman) predeceased the settlor. Such remainders have, as stated in *Warrington* v. *Chester*, 294 Ill. 524, 529 (1920), "all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition."

Further, under Illinois law, the vested remainders in Spiegel's children could be divested only if the divesting conditions occurred exactly as specified in the trust. Accordingly, they could have been divested in favor only of the persons specified to take if a child predeceased the settlor, that is, only in favor of other children or descendants of children.

The Spiegel trust contained no express provision for reverter. If any or all of Spiegel's children had died

during Spiegel's lifetime, the corpus of the trust could not have reverted to Spiegel but the deceased children's interests would have passed under the wills of the children or to the children's next of kin as the children's intestate property, subject only to subsequent divestment, upon Spiegel's death, in favor of other children or children's descendants, if any, who might survive Spiegel. If no child and no child's descendant survived Spiegel, the legatees or next of kin of deceased children would not be divested and would take possession of the corpus. Spiegel could not have received the trust property regardless of what happened unless he became a legatee or next of kin of one of his children.

Section 81.17 of Estate Tax Regulations 105, applicable to Section 811(c) of the Internal Revenue Code, provides that a transfer is not intended to take effect in possession or enjoyment at or after death unless (in addition to postponed possession or enjoyment) "the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)." Spiegel possessed no interest in the property by the terms of the trust, and no possibility of interest by operation of Illinois law, and, hence, no part of the trust corpus was includable in his gross estate.

2. The decision of the Circuit Court of Appeals is in conflict with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 (1929). The *Reinecke* decision is controlling here.[3]

There is no difference, which can affect estate tax liability, between the *Reinecke* "five trusts", held non-taxable, and the Spiegel trust. The remainders in the *Reinecke* "five trusts", just as in the Spiegel trust, vested

3. See supporting Brief, pp. 22-24, for argument with respect to this second reason for allowance of writ.

in interest immediately upon creation of the trusts, although in neither the *Reinecke* nor the instant case could possession of corpus be taken until a time at or after the settlor's death.[4] In each case, if a remainderman predeceased the settlor, there was an express gift over to others than the settlor. In neither case was there any provision for reverter to the settlor. Illinois law controlled the *Reinecke* decision and governs here. The provisions of Section 402(c) of the Revenue Act of 1921, which governed the *Reinecke* case, are essentially the same as those of Section 811(c), at issue in this case.

In the *Reinecke* case, this Court held that the property, comprising the "five trusts", was not includable in the deceased settlor's gross estate, and Petitioners here should similarly be held not liable for the deficiency claimed.

The *Reinecke* case has never been overruled by this Court and the decision there cannot be reconciled with that of the Circuit Court of Appeals in the instant case. The Tax Court decided the instant case on the authority of the *Reinecke* decision (R. 129).

3. The decision below is in conflict with decisions of this Court with respect to finality of decisions of the Tax Court.[5]

The Tax Court held (R. 129) that Spiegel had not made a transfer intended to take effect in possession or enjoyment at or after his death. The Tax Court's decision involved a mixed question of law and fact, not a clear-cut question of law. In considering cases under Section 811(c) of the Internal Revenue Code, the Tax Court, as it states in *Estate of Nettie Friedman, Deceased*, 8 T. C. , No. 7 (1947), proceeds on the assumption that it "must

4. See p. 23 of supporting Brief for provisions of the *Reinecke* "five trusts."

5. See supporting Brief, pp. 24-27, for relevant authorities and argument with respect to this third reason for allowance of writ.

look to the intention of the grantor of the trust", and in the instant case it, in fact, received evidence of Spiegel's intent (R. 33-5). In determining intention, it examines both the instrument involved and the framework of extrinsic circumstances, and did so in the instant case (R. 32, 35-6). Intention is a question of fact.

This Court held, in *Dobson* v. *Commissioner*, 320 U. S. 489, 502 (1943), that the decision of the Tax Court must stand unless the elements of its decision may be separated "so as to identify a clear-cut mistake of law". In the instant case, no such separation can be made. The Circuit Court of Appeals should, therefore, have affirmed the Tax Court.

4. The Circuit Court of Appeals decided that Petitioners are liable for tax solely because of the existence of a possibility of reverter by operation of law. It thus decided an important question of federal law which has not been, but should be, settled by this Court.

Even though the Spiegel remainders had been contingent (as the Circuit Court of Appeals erroneously determined) and had, therefore, left the settlor with a remote possibility of reverter by operation of law, this Court has not passed upon whether the existence of a mere possibility of reverter *by operation of law* renders trust property taxable under Section 811(c) of the Internal Revenue Code. That question should be finally passed on by this Court.[6]

Three Circuit Courts of Appeals (for (i) the Seventh Circuit in this case, (ii) the Second Circuit in *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (1946), and (iii) the Ninth Circuit in *Commissioner* v. *Bank of California (Estate of M. E. Girvin)*, 155 F. 2d 1 (1946), *certiorari* denied, 67 S. Ct. 73) have held that, notwithstanding the absence

6. See supporting Brief, pp. 28-31, for relevant authorities and argument with respect to this fourth reason for allowance of writ.

of any express retention of rights by a settlor, the existence of a mere possibility of reverter by operation of law constitutes a trust a transfer intended to take effect in possession or enjoyment at or after the settlor's death, and, therefore, requires inclusion of the trust property in the deceased settlor's gross estate for estate tax purposes. Those courts stated that they considered themselves bound by this Court's *Hallock*, *Fidelity-Philadelphia* and *Field* decisions, in each of which this Court was considering an express reservation by a settlor, not a possibility of reverter by operation of law. Each of those Circuit Courts of Appeals' decisions reversed a Tax Court decision.

Directly opposed to those decisions of the Circuit Courts of Appeals, the Tax Court (in (i) *Estate of Nina M. Campanari*, 5 T. C. 488 (1945), (ii) *Estate of Edward P. Hughes*, 7 T. C. ....., No. 157 (1946) and (iii) *Estate of Nettie Friedman*, 8 T. C. ....., No. 7 (1947)) held that a mere possibility of reverter by operation of law, and not by express provision, does not require inclusion of trust property in the gross estate of a decedent. Each of the Tax Court's decisions was subsequent to the decisions of this Court in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases.[7] The Tax Court's decisions in the *Hughes* and *Friedman* cases were subsequent to the decisions of the Circuit Courts of Appeals in the *Bayne* and *Girvin* cases and after denial of certiorari in the *Girvin* case. In the *Campanari* case, the Tax Court stated that the *Fidelity-Philadelphia* decision was not applicable, and, in the *Hughes* and *Friedman* cases, that the *Hallock*, *Fidelity-Philadelphia* and *Field* decisions of this Court did not apply.

7. Just as in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases, and unlike the case at bar, in the *Bayne* and *Girvin* cases and in each of the Tax Court cases, the settlor reserved an interest in income.

There is, therefore, an irreconcilable conflict between the Tax Court and the Circuit Courts of Appeals as to proper interpretation of this Court's decisions in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases as applied to mere possibilities of reverter by operation of law.

The question of applicability of those decisions to such possibilities of reverter, still undecided by this Court, arises frequently and generally involves large sums. The uncertain state of the law is most disturbing to taxpayers and to the bar generally. See, *Paul*, Federal Estate and Gift Taxation—1946 Supplement—pp. 170-201. It is important that this Court finally pass upon this question as soon as possible.

SUPPORTING BRIEF.

A supporting Brief, including Specification of Errors, is presented herewith.

WHEREFORE, it is respectfully submitted that the Writ of Certiorari should be granted.

HERBERT A. FRIEDLICH,

LEO F. TIERNEY,

HARRY THOM,

LOUIS A. KOHN,
Attorneys for Petitioners.

March 19, 1947.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death.

(2) In failing to hold that no part of such value was properly includable in decedent's gross estate.

(3) In holding that there should be included, in decedent's gross estate, property in which decedent had no interest.

(4) In holding that decedent had any possibility of reverter in the trust property by operation of Illinois law.

(5) In failing to hold the decision of The Tax Court of the United States to be conclusive.

(6) In reversing the decision of The Tax Court of the United States.

BRIEF AND ARGUMENT.

I.

SPIEGEL HAD NO POSSIBILITY OF REVERTER BY OPERATION OF ILLINOIS LAW AND NO OTHER INTEREST IN THE TRUST PROPERTY.

The trust made no provision for retention by, or reversion to, Spiegel of any interest in the trust and he, therefore, could not take the trust property pursuant to any term of the instrument.

The remainders vested in the named children upon creation of the trust and, therefore, the trust could not fail and the property could not revert to Spiegel by operation of Illinois law, which is controlling.

It Cannot Be Determined Under Illinois Law Whether the Grantor of a Remainder Has a Possibility of Reverter by Operation of That Law Without First Determining Whether the Remainder Is Vested or Contingent.

Upon the death of a vested remainderman, his vested remainder passes under the remainderman's will or as the remainderman's intestate property to his next of kin. *Baley* v. *Strahan*, 314 Ill. 213, 219, 220 (1924), cited in *Klein* v. *United States*, 283 U. S. 231, 234; *Hawkins* v. *Bohling*, 168 Ill. 214, 219 (1897); *Smith* v. *West*, 103 Ill. 332, 337, 339 (1882). If the vested remainderman dies intestate without next of kin, the remainder interest escheats. See Restatement of Law of Trusts, § 411 (*l*). Accordingly, a vested remainder cannot revert to the settlor by operation of Illinois law.

A grantor of a *contingent* remainder, on the contrary,

retains a reversionary interest and, therefore, has a possibility of reverter by operation of law. In the event the grantor dies, his contingent reversionary interest passes under the grantor's will or to his next of kin as his intestate property. *Gehlbach* v. *Briegel*, 359 Ill. 316, 320 (1935); *Matthews* v. *Andrews*, 290 Ill. 103, 105 (1919); *Belding* v. *Parsons*, 258 Ill. 422, 426 (1913).

The existence or non-existence of a possibility of reverter to a grantor by operation of law must be determined by the controlling local property law. Before it can be determined that such a possibility exists under Illinois law, it is necessary first to determine whether remainders created by the instrument are vested or contingent. If vested, no such possibility exists. If contingent, there is a possibility of reverter by operation of Illinois law.

The decisions of this Court, to the effect that it will not decide tax liability under Section 811(c) of the Internal Revenue Code on the basis of niceties of conveyancing, have all involved trusts which contained *express* provision for reverter under certain contingencies to, or for a power of appointment by, the grantor. See, *Helvering* v. *Hallock*, 309 U. S. 106 (1940); *Fidelity-Philadelphia Trust Co.* v. *Rothensies;* 324 U. S. 108 (1945); *Commissioner* v. *Field*, 324 U. S. 113 (1945). No question of reverter by operation of law was before this Court in any of those cases.

The three *Hallock* trusts contained express provisions for reversion to the grantor if he survived the remaindermen. See 309 U. S. at p. 115. The instruments, considered in *Klein* v. *United States*, 283 U. S. 231, 232, *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, 40, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, 50 (all referred to in the *Hallock* opinion), contained express provisions for reversions to the grantor if he survived the remaindermen. The *Fidelity-Philadelphia* trust gave the settlor a testamentary power of appointment if the re-

maindermen predeceased the settlor. See 324 U. S. at p. 109. The *Field* trust contained not only an express provision for reversion to the settlor if he survived the remaindermen but also gave him the right to reduce or cancel the remainders by will or other instrument. See 324 U. S. at pp. 115 and 117. In each case, the property would, if certain contingencies occurred, go back to the settlor by virtue of a specific provision of the trust instrument and this Court refused to consider technical differences in the provisions.

It is, however, self-evident that a possibility of reverter solely *by operation of law*—not by express provision of a trust—cannot exist unless the local applicable property law (here, Illinois law) will, in fact, so operate as to make a reverter a possibility.

Under Illinois Law, a Vested Remainder Cannot Fail or Revert.

Under Illinois decisions, a vested remainder cannot fail, and, therefore, the property cannot go back to the grantor in the absence of an express provision to that effect. By definition, a vested remainder is a present property interest of which someone must always be ready to take possession whenever and however the preceding estate terminates. If a vested remainderman dies prior to termination of the prior estate, there can be no reversion to the settlor, but (because the remainder is a then existing and inheritable property interest) either the remainderman's legatees or next of kin will take or there will be an escheat. *Baley* v. *Strahan, supra,* 314 Ill. at pp. 218-20 (1924), *Hawkins* v. *Bohling, supra,* 168 Ill. at p. 219 (1897); *Smith* v. *West, supra,* 103 Ill. at p. 339 (1882); Restatement of Law of Trusts, § 411 (*l*); *Kales*, Estates, Future Interests and Illegal Conditions and Restraints in Illinois, 2d ed. (1920), § § 93, 94, 327; *Gray*,

The Rule Against Perpetuities, 4th ed. (1942), § 101; Ill. Rev. Stat. 1945, Ch. 3, Sec. 162, Seventh.

The Spiegel Remainders Were Vested. Respondent Has Conceded They Were Vested.

There is no doubt that, under Illinois law, the Spiegel remainders were vested. On oral argument before the Circuit Court of Appeals, Respondent's counsel conceded that those remainders were vested. The fact that they might be divested pursuant to conditions subsequent or executory limitations, if a child (vested remainderman) predeceased, and other children or descendants of children survived, the settlor, did not change their vested character. *Lachenmyer* v. *Gehlbach*, 266 Ill. 11 (1914); *Welch* v. *Crowe*, 278 Ill. 244 (1917); *Boye* v. *Boye*, 300 Ill. 508, 511 (1921); *Murphy* v. *Westhoff*, 386 Ill. 136 (1944); *Stombaugh* v. *Morey*, 388 Ill. 392 (1944).

A remainder, subject to divestment upon the death of the remainderman prior to the death of the life tenant, is, under Illinois decisions, a vested remainder and clearly distinguishable from a contingent remainder conditioned upon the remainderman surviving the life tenant. See, *Warrington* v. *Chester*, 294 Ill. 524, 528-9 (1920).

The Spiegel remainders vested in interest immediately upon creation of the trust. *Hickox* v. *Klaholt*, 291 Ill. 544, 548 (1920), and cases there cited.

Rules governing the vesting of remainders in realty, likewise, govern vesting of remainders in personalty. *Winterland* v. *Winterland*, 389 Ill. 384, 388 (1945).

Authorities as to Vesting Under Wills Are Applicable to Inter Vivos Trusts.

Contrary to the holding of the Circuit Court of Appeals that decisions involving vesting under wills are inapplicable to vesting under *inter vivos* trusts (R. 153), Illinois authorities with respect to vesting under wills are, in fact, equally applicable to *inter vivos* instruments. *Smith* v. *Dugger*, 310 Ill. 624, 626-7 (1924); *Harder* v. *Matthews*, 309 Ill. 548, 566 (1923). In each of the last cited cases, counsel argued that authorities, dealing with vesting under wills, were not relevant to the determination of vesting under *inter vivos* instruments, but the Illinois Supreme Court refused to recognize any such distinction and cited and followed *Lachenmyer* v. *Gehlbach*, *supra*, which involved the construction of a will.

The Spiegel Remainders Could Not Possibly be Divested in Favor of Spiegel or His Estate.

Under Illinois law, vested remainders can be divested only if the divesting conditions occur exactly as specified in the instrument. *Illinois Land and Loan Co.* v. *Bonner*, 75 Ill. 315, 327 (1874); *McFarland* v. *McFarland*, 177 Ill. 208, 217 (1898); *Henderson* v. *Harness*, 176 Ill. 302, 309 (1898); *Continental Illinois National Bank & Trust Co.* v. *Kane*, 308 Ill. App. 110, 124 (1941).

The children's vested remainders were specifically subject to divestment in favor only of the persons named to take if a child predeceased the settlor, that is to say, only other children or descendants of children. If all of Spiegel's children and all their descendants had died during Spiegel's lifetime, the corpus of the trust would *not* have reverted to Spiegel or his estate. The children's vested interests would, under Illinois law, have

passed, upon the deaths of the children, under the wills of the children or to their next of kin as their intestate property, subject to divestment only in favor of any other children or any children's descendants, who might survive Spiegel. If, as assumed, no child or child's descendant survived Spiegel, possession of the trust corpus would, upon Spiegel's death, have gone to the legatees or next of kin of the deceased children—not to Spiegel or his estate. If all of the children died intestate and without next of kin, their vested interests would have escheated.

Spiegel could not have taken the trust property under any conditions, except, of course, as a legatee or next of kin of one of his children.

The Trust Property Was Not Taxable Under the Estate Tax Regulations.

Section 81.17 of Regulations 105, applicable to Section 811(c) of the Internal Revenue Code, provides that a transfer is not intended to take effect in possession or enjoyment at or after death unless (in *addition* to postponement of possession or enjoyment until at or after the settlor's death):

> "the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)."

Since Spiegel, at his death, possessed no possibility of right or interest in the trust property, either by the express terms of the trust or by operation of Illinois law, his estate cannot be liable for estate taxes based upon the value of any part of the trust corpus.

II.

THE INSTANT CASE IS CONTROLLED BY REINECKE v. NORTHERN TRUST COMPANY, 278 U. S. 339.

In the *Reinecke* case, this Court decided that the property, included in the so-called "five trusts" there before the Court, had, upon creation of the trusts, passed from the control of the settlor as completely, for all practical purposes, as if the transfers had been absolute and not in trust, and the "five trusts" were, therefore, held not to be subject to estate taxes.

There Is No Substantial Difference Between the Reinecke and Spiegel Trusts.

Each of the *Reinecke* "five trusts" terminated, and corpus thereof could be distributed, only *at or after the settlor's death,* and the remaindermen could take possession only if living at the date of distribution. Each of the trusts provided for gifts over to persons other than the settlor, in the event a remainderman did not survive the date of termination and distribution. There was no provision in any of the "five trusts" for any reversion to the settlor.

Erroneous Statement in This Court's Opinion as to Four of the Reinecke Trusts.

The *Reinecke* opinion (278 U. S. at p. 344), however, states that four of the "five trusts" were "terminable five years after the settlor's death or on the death of the respective life tenants, *whichever should first happen,*" with remainders over. If this statement is intended to mean that the trusts were terminable upon the death of an income beneficiary *prior* to the death of the settlor, it is submitted that the statement is incorrect.

The *Transcript of Record* in the *Reinecke* case (*Reinecke* v. *The Northern Trust Company*, No. 90, October Term, 1928) sets out the four trusts *verbatim*. Each of the four trusts provided (*Reinecke* Record pp. 20, 27, 35, 43) that the trust—

> "* * * shall terminate at the expiration of *five* (5) *years from the death of* [*the settlor*]; provided, however, that if [the child of the settlor named therein] shall die *prior* to the expiration of said five (5) years, then and in that case said trust shall terminate at the death of the *survivor* of [the settlor] and [the child of the settlor named therein]. And upon the termination of said trust the said trust shall be paid over to [the child of the settlor named therein] if he shall be then living, * * *." (Italics supplied.)

There followed provisions for remainders over to others than the settlor, in case the named child of the settlor was not living at the termination of the trust.

The Government's Brief, filed in this Court in the *Reinecke* case, correctly states (Statement of the Case, p. 6), with respect to the four trusts in question, that:

> "Trust No. 4478 (R. 17) is identical with trusts numbers 4479 (R. 25), 4480 (R. 32) and 4481 (R. 40), except as to the beneficiaries. * * * The trust terminates five years *after* the settlor's death or at the death of the *survivor* of the beneficiary and settlor (R. 20, 27, 35, 43). * * *" (Italics supplied.)

This Court decided the *Reinecke* case on the correct assumption, namely, that each of the "five trusts" terminated and was distributable *at or after* the death of the settlor. This appears from the statement of the Court (278 U. S. at p. 347) to the effect that the question presented was whether "the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed" is included within the taxing provisions of the applicable Revenue Act. The

Court's opinion, further, correctly considered the *Reinecke* case as one involving "a life estate in one with remainder over to another at or after the donor's death." (278 U. S. at p. 348.)

The Reinecke Trusts Were Held Non-Taxable and the Spiegel Trust Should, Likewise, Be Held Non-Taxable.

As to the *Reinecke* "five trusts," this Court held that the shifting of economic interests in the trust property, which was the subject of the tax, was complete when the trust was created (278 U. S. at p. 346), and that the statute did not tax completed *inter vivos* gifts (not in contemplation of death) where, as in the *Reinecke* case, the donor retained no control, possession or enjoyment of the property. (278 U. S. at p. 348.)

The Spiegel trust was, likewise, a completed gift upon its creation and the donor thereafter retained no control, possession or enjoyment of any part of the trust property. See pp. 19-21, *supra*, this Brief.

The principles, laid down in the *Reinecke* decision, are applicable to the instant case and it is submitted that this Court should hold that Petitioners are not liable for the tax claimed by Respondent.

III.

UNDER DOBSON v. COMMISSIONER, 320 U. S. 489, THE DECISION OF THE TAX COURT MUST STAND.

In the *Dobson* case, this Court held (320 U. S. at p. 501) that, if the Tax Court's decision has "'warrant in the record' and a reasonable basis in the law," it must be treated as final, since "'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body'". The Court there

stated the applicable rule to be (320 U. S. at p. 502) that "when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand."

The Circuit Court of Appeals for the Second Circuit, in *Brooklyn National Corporation* v. *Commissioner*, 157 F. 2d 450 (1946), *certiorari* denied 67 S. Ct. 96, has construed the *Dobson* decision to require (p. 452) that:

> "before we may substitute our own interpretation of the provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor."

The Tax Court's Decision in the Instant Case Involved a Mixed Question of Law and Fact.

In the case at bar, the Tax Court decided that Spiegel had retained no "string or tie" amounting to a possibility of reversion and did *not* make a transfer intended to take effect in possession or enjoyment at or after his death (R. 129). Spiegel's intent is a question of fact, for, as stated in *Edgington* v. *Fitzmaurice*, 29 Ch. D., 459, 483:

> "* * * the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

The Tax Court has consistently recognized that the intention of a grantor must be determined as a prerequisite to a decision that he made a transfer intended to take effect in possession or enjoyment at or after his death. Thus, in *Estate of Nettie Friedman, Deceased*, 8 T. C. ___, No. 7, 6 [C. C. H.] T. C. Decisions No. 15,552 (January 17, 1947), the Tax Court said (p. 25,913 of 6 T. C. Decisions):

> "We must look to the intention of the grantor of the trust, and the instrument of transfer must be examined to show such intent. * * *
>
> "In addition to the test of intention 'the framework of extrinsic circumstances' furnishes guidance * * *."

Similarly, in *James E. Henderson, Executor* v. *Rogan*, ...F. 2d..... (C. C. A. 9th, January 17, 1947), 47-1 U. S. T. C. [C. C. H.] ¶ 10,540, involving the question whether the exercise of a power of appointment by deed was subject to estate taxes because intended to take effect in possession or enjoyment at or after death, the Court said (p. 6216 of 47-1 U. S. T. C.):

> "The taxpayer has made no showing that the trial judge was unwarranted in finding as a fact that the decedent intended and was motivated by the desire that the transfers take effect at or after her death."

The Court of Claims, in *Central Hanover Bank & Trust Company* v. *United States*, 58 F. Supp. 565, 566-7 (1945), likewise holds that, in order to tax an estate under Section 811(c) of the Internal Revenue Code (on account of a transfer intended to take effect at or after death), the facts must show that the settlor intended to make such a transfer.

The Tax Court Received Evidence That Spiegel Did Not Intend the Trust to Take Effect at or After His Death.

Here, the evidence before the Tax Court justified a decision that Spiegel intended the transfer in trust to be a present absolute conveyance in connection with which he retained no rights whatsoever.

The attorney, who drew the trust, testified that Spiegel had, on several occasions prior to the drafting of the trust, stated that he desired and intended the trust property to be transferred to trustees for the benefit of his children and wanted at no time to have any interest or title therein.

The attorney testified, further, that, in drafting the trust, he had endeavored to carry out those instructions and believed he had done so (R. 34-5).

In addition, "the framework of extrinsic circumstances," which the Tax Court uses as a guide, makes it clear that Spiegel had no intention of making a transfer which would or could revert to him. In the Spiegel case, as in the *Friedman* case, *supra,* the Tax Court heard evidence from which it could properly find that the probability of any reverter by operation of law (if such a reverter had been possible) was so remote as to make it certain that the settlor had no intention of retaining any interest or possibility of interest in the trust property. Respondent introduced evidence of Spiegel's age at the date of the trust's inception, the then ages of his three children, the then probability (less than 2 chances in 100) that he would survive his children, and the then actuarial value (less than $4500) of any possibility of getting back the trust property (valued at more than $1,140,000 at date of death) provided he survived his three children (R. 35-6). Petitioners introduced similar evidence of Spiegel's age at date of death, the then ages of his three children and three grandchildren, the then probability (less than 2 chances in 10,000) that he would survive his then living three children and three grandchildren, and the then actuarial value (less than $85) of any possibility of receiving the trust property back in the event he survived his six children and grandchildren (R. 32). The Tax Court's Findings of Fact adopted this evidence (R. 128-129).

There is, therefore, no doubt that the Tax Court's decision was not based upon a clear-cut question of law, but resulted from application of the law to evidence of intent.

The Tax Court, in the instant case, decided mixed questions of law and fact, and the Circuit Court of Appeals

should, therefore, have affirmed the decision of the Tax Court.

IV.

THIS COURT HAS NOT PASSED UPON THE QUESTION WHETHER A MERE POSSIBILITY OF REVERTER BY OPERATION OF LAW RENDERS TRUST PROPERTY TAXABLE UNDER SECTION 811(c).

THAT QUESTION SHOULD BE SETTLED BY THIS COURT.

Since the Spiegel remainders were vested and, accordingly, Spiegel actually had no possibility of reverter by operation of Illinois law, the question of applicability of Section 811(c) of the Internal Revenue Code to mere possibilities of reverter by operation of law is not presented by the instant case. However, even though this Court should conclude, as did the Circuit Court of Appeals, that the remainders were contingent and that, therefore, such a possibility existed, this Court has never decided that, or considered whether, the existence of a mere possibility of reverter by operation of law requires inclusion of the property, which is subject to such possibility, in the settlor's gross estate under Section 811(c).

Interpretation of Hallock and Related Decisions by Circuit Courts of Appeals.

Three Circuit Courts of Appeals (for the Seventh Circuit in the instant case, the Second Circuit in *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (1946), and the Ninth Circuit in *Commissioner* v. *Bank of California* (*Estate of M. E. Girvin*), 155 F. 2d 1 (1946), *certiorari* denied, 67 S. Ct. 73) have (reversing decisions of the Tax Court) held that, even though a trust contains

no express retention of any right of reverter, the existence of a mere possibility of reverter by operation of law is sufficient to require inclusion of the trust property in the deceased settlor's gross estate.[8] Each of those Circuit Courts of Appeals considered itself bound so to decide in the belief that this Court's decisions in the *Hallock, Fidelity-Philadelphia* and *Field* cases controlled. In those three cases, however, this Court considered, not reverters by operation of law, but *express* reservations of rights to get the property back if certain contingencies occurred. See pp. 17-18, *supra*, this Brief.

Interpretation of Hallock and Related Decisions by the Tax Court.

The Tax Court has taken and maintains a position directly opposite that of the Circuit Courts of Appeals, and holds that, even though a mere possibility of reverter by operation of law does exist, Section 811(c) does not, for that reason, require the inclusion of corpus in the deceased settlor's gross estate. In *Estate of Nina M. Campanari*, 5 T. C. 488 (1945), *Estate of Edward P. Hughes*, 7 T. C. ....., No. 157, 6 [CCH] T. C. Decisions No. 15,510 (December 16, 1946), and *Estate of Nettie Friedman*, 8 T. C. ....., No. 7, 6 [CCH] T. C. Decisions No. 15,552 (January 17, 1947), the court held that, regardless of the existence of a possibility of reverter by operation of law, the corpus of the trust could not be included in the gross

8. The Fifth Circuit takes the same view. See *Thomas* v. *Graham*, 158 F. 2d 561 (1946). The *Thomas* case was an appeal from a District Court and involved not only possibility of reverter by operation of law but also the question of contemplation of death. There, Hutcheson, C. J., concurred on the contemplation of death issue but dissented from the holding that the existence of a mere possibility of reverter by operation of law requires inclusion of trust corpus in a decedent's gross estate. See also, *Beach* v. *Busey*, 156 F. 2d 496 (C. C. A. 6th, 1946), *certiorari* denied, which is in accord with the *Bayne* and *Girvin* decisions on this point.

estate. Each of the Tax Court decisions was rendered after the *Hallock, Fidelity-Philadelphia* and *Field* decisions.

In the *Campanari* decision, the Tax Court stated that the case before it was clearly distinguishable from the *Fidelity-Philadelphia* case, and held that there was no estate tax liability. In the *Hughes* decision (rendered after the decision of the Circuit Courts of Appeals in both the *Girvin* and *Bayne* cases and after denial of certiorari in the *Girvin* case), the Tax Court recognized (p. 25,595 of 6 [CCH] T. C. Decisions) that the Second Circuit's *Bayne* decision

> "holds that those decisions [*Fidelity-Philadelphia* and *Field*] require the inclusion in decedent's estate of the trust corpus where there exists a possibility of reverter even if only by implication of law and irrespective of how remote such possibility may be".

The Tax Court, however, refused to follow the *Bayne* decision, stating that it "differs from our interpretation of the decisions of the Supreme Court". In the *Friedman* case (likewise decided after the decisions of the Circuit Courts of Appeals in both the *Bayne* and *Girvin* cases and after denial of certiorari in the *Girvin* case), the Tax Court adhered to its view that a mere possibility of reverter by operation of law does not render a transfer one intended to take effect in possession or enjoyment at or after the death of the settlor, although it expressly stated that the *Bayne* decision interpreted the *Hallock, Field* and *Fidelity-Philadelphia* decisions differently. See also, *Estate of George P. Rhodes*, 6 [CCH] T. C. Decisions, No. 15,647 (M) (February 24, 1947), at p. 26,356-7.

Conflicting Interpretations of This Court's Decisions.

There is, therefore, an irreconcilable conflict between the Tax Court and at least three Circuit Courts of Appeals as to the application of this Court's decisions in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases, where there exists a mere possibility of reverter to the settlor by operation of law. The Tax Court recognizes the conflict but, nevertheless, has consistently refused, and, as late as January 17, 1947, continued to refuse, to follow the Circuit Courts of Appeals' interpretation.[9]

The instant case and the *Bayne* and *Girvin* cases were all decided by the Tax Court in favor of the taxpayers. In each case, however, a Circuit Court of Appeals reversed the Tax Court because it considered itself bound by this Court's decisions.

The resulting confusion and uncertainty on this point makes speedy clarification by this Court imperative. The question arises frequently and often the payment of large amounts of taxes (over $450,000 in the case at bar) is involved. Either the Tax Court or the Circuit Courts of Appeals—not both—have correctly interpreted this Court's opinions. However, which court is right will not, and cannot, be settled until this Court authoritatively passes upon the proper interpretation of its own decisions.

---

9. In the instant case, the settlor retained neither a life estate nor any reversionary interest. In the *Fidelity-Philadelphia* and *Field* cases, however, the settlor not only expressly retained a reversionary interest but also reserved an interest in income, which further distinguishes those cases from the case at bar. See: *Paul*, Federal Estate and Gift Taxation, 1946 Supplement, pp. 192-3; *Spencer*, The Federal Estate Tax on *Inter Vivos* Trusts: A Common Sense Rule for Hallock Cases, 59 Harv. L. Rev. pp. 43, 67, note 59 (1945); *Eisenstein*, The Hallock Problem: A Case Study in Administration, 58 Harv. L. Rev. 1141, 1169 (1945). Likewise, in both the *Bayne* and *Girvin* cases and also in the three cited Tax Court cases, the settlor retained an interest in income.

Conclusion.

It is submitted that the Writ of Certiorari should be granted for the following reasons:

1. Spiegel retained no express right of reversion and no other interest whatsoever in the trust property, and controlling Illinois law would not have operated to cause the trust property to revert to Spiegel under any circumstances.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of this Court in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.

3. The decision of the Tax Court that Spiegel did not make a transfer, intended to take effect in possession or enjoyment at or after his death, involved a mixed question of law and fact and not a clear-cut question of law. Therefore, the Circuit Court of Appeals should have affirmed the Tax Court under the principles laid down in *Dobson* v. *Commissioner*, 320 U. S. 489.

4. At least three Circuit Courts of Appeals hold that this Court's decisions (in the *Hallock*, *Fidelity-Philadelphia* and *Field* cases) do, and the Tax Court continues to hold that those same decisions do not, require estate taxes to be imposed under Section 811(c) of the Internal Revenue Code on transfers with respect to which the settlor retains no express rights and his only possibility of a reverter is by operation of local property law upon a failure of the trust. This Court should settle the question as soon as possible.

Respectfully submitted,

HERBERT A. FRIEDLICH,

LEO F. TIERNEY,

HARRY THOM,

LOUIS A. KOHN,

Attorneys for Petitioners.